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5 IN THE UNITED STATES DISTRICT COURT

6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7
8 MEIJER, INC. & MEIJER DISTRIBUTION,
9 INC.,

No. C 07-5985 CW

10 Plaintiffs,

ORDER DENYING ABBOTT'S
MOTION TO DISMISS
(DOCKET NO. 19)

11 v.

12 ABBOTT LABORATORIES,

13 Defendant.

14
15 ROCHESTER DRUG COOPERATIVE, INC.,

No. C 07-6010 CW

16 Plaintiff,

ORDER DENYING ABBOTT'S
MOTION TO DISMISS
(DOCKET NO. 23)

17 v.

18 ABBOTT LABORATORIES,

19 Defendant.

20
21 LOUISIANA WHOLESALE DRUG COMPANY,
INC.,

No. C 07-6118 CW

22 Plaintiff,

ORDER DENYING ABBOTT'S
MOTION TO DISMISS
(DOCKET NO. 38)

23 v.

24 ABBOTT LABORATORIES,

25 Defendant.

26

27

28

1 SAFEWAY INC., et al.,

2 Plaintiffs,

No. C 07-5470 CW

3 v.

4 ABBOTT LABORATORIES,

ORDER DENYING ABBOTT'S
MOTIONS TO DISMISS
(DOCKET NOS. 24 AND 29)

5 Defendant.

6
7 SMITHKLINE BEECHAM CORPORATION d/b/a/
8 GLAXOSMITHKLINE,

No. C 07-5702 CW

9 Plaintiff,

ORDER DENYING ABBOTT'S
MOTIONS TO DISMISS
(DOCKET NOS. 44 AND 46)
AND DENYING ABBOTT'S
MOTION TO TRANSFER
(DOCKET NO. 19)

10 v.

11 ABBOTT LABORATORIES,

12 Defendant.

13
14 RITE AID CORPORATION, et al.,

No. C 07-6120 CW

15 Plaintiffs,

ORDER DENYING ABBOTT'S
MOTION TO DISMISS
(DOCKET NO. 18)

16 v.

17 ABBOTT LABORATORIES,

18 Defendant.

19
20 /
21
22 Defendant Abbott Labs moves to dismiss the complaint in each
23 of these related actions, arguing that Plaintiffs' claims for
24 monopolization and attempted monopolization of the market for
25 boosted protease inhibitors are foreclosed by the recent Ninth
26 Circuit case, Cascade Health Solutions v. Peacehealth, 515 F.3d 883
27 (9th Cir. 2008). Abbott moves separately to dismiss
28 GlaxoSmithKline's (GSK) claims in the SmithKline Beecham case for

1 breach of the implied covenant of good faith and fair dealing,
2 violation of the North Carolina Unfair Trade Practices Act and
3 violation of the North Carolina Prohibition Against Monopolization.
4 Finally, Abbott moves to transfer the SmithKline Beecham case to
5 Illinois. Plaintiffs oppose each of these motions. The matters
6 were heard on March 6, 2008. Having considered oral argument and
7 all of the papers submitted by the parties, the Court denies
8 Abbott's motions.

9 BACKGROUND

10 Protease inhibitors (PIs) are considered the most potent class
11 of drugs to combat the HIV virus. In 1996, Abbott introduced
12 Norvir as a stand-alone PI with a daily recommended dose of 1,200
13 milligrams (twelve 100-mg capsules a day), priced at approximately
14 eighteen dollars per day. Norvir is the brand name for a patented
15 compound called ritonavir.

16 After Norvir's release, it was discovered that, when used in
17 small quantities with another PI, Norvir would "boost" the anti-
18 viral properties of that PI. Not only did a small dose of Norvir
19 -- about 100 to 400 milligrams per day -- make other PIs more
20 effective and decrease the side effects associated with high doses,
21 but it also slowed the rate at which HIV developed resistance to
22 the effects of those PIs. The use of Norvir as a "booster" has
23 enabled HIV patients to live longer. But the use of Norvir as a
24 booster, and not a stand-alone PI, has also meant that the average
25 daily price of Norvir has plummeted since Norvir was first
introduced, because patients need a much smaller daily dose of
Norvir when it is used as a booster compared to when it is used as
a stand-alone PI. By 2003, the average price for a daily dose of

1 Norvir was \$1.71.

2 In 2000, Abbott introduced Kaletra, a single pill containing
3 the PI lopinavir as well as ritonavir, which is used to boost the
4 effects of lopinavir. Although effective and widely used, Kaletra
5 causes some patients to experience significant side effects.

6 In 2003, two new PIs, Bristol-Myers Squibb's Reyataz and GSK's
7 Lexiva, were about to be introduced to the market. Studies showed
8 that, when boosted with Norvir, the new PIs were as effective as
9 Kaletra, and were more convenient. In July, 2003, Reyataz was
10 successfully introduced to the market. As a result, Kaletra's
11 market share fell more than Abbott had anticipated. The average
12 daily dose of Norvir also fell. Before Reyataz's release, the most
13 common boosting dose of Norvir ranged from 200 milligrams to 400
14 milligrams a day. Clinical trials, however, showed that a Norvir
15 dose of only 100 milligrams a day effectively boosted Reyataz.

16 On December 3, 2003, Abbott raised the wholesale price of
17 Norvir by 400 percent while keeping the price of Kaletra constant.
18 Abbott contends that it did this so that the price of Norvir would
19 be more in line with the drug's enormous clinical value.
20 Plaintiffs contend that the Norvir price increase was an illegal
21 attempt to achieve an anti-competitive purpose in the "boosted
22 market," which Plaintiffs define as the market for those PIs, such
23 as Reyataz, Lexiva and Kaletra, that are prescribed for use with
24 Norvir as a booster. Plaintiffs sued for, among other things,
25 monopolization and attempted monopolization in violation of the
26 Sherman Act, 15 U.S.C. § 2.

1

LEGAL STANDARD

2 I. Motion to Dismiss

3 A complaint must contain a "short and plain statement of the
4 claim showing that the pleader is entitled to relief." Fed. R.
5 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to state
6 a claim, dismissal is appropriate only when the complaint does not
7 give the defendant fair notice of a legally cognizable claim and
8 the grounds on which it rests. See Bell Atl. Corp. v. Twombly,
9 ___ U.S. ___, 127 S. Ct. 1955, 1964 (2007). In considering whether
10 the complaint is sufficient to state a claim, the court will take
11 all material allegations as true and construe them in the light
12 most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792
13 F.2d 896, 898 (9th Cir. 1986).

14 II. Motion to Transfer

15 Title 28 U.S.C. § 1404(a) provides, "For the convenience of
16 parties and witnesses, in the interest of justice, a district court
17 may transfer any civil action to any other district or division
18 where it might have been brought." The statute itself identifies
19 three factors to consider on a motion to transfer: 1) the
20 convenience of the parties; 2) the convenience of the witnesses;
21 and 3) the interests of justice. 28 U.S.C. § 1404(a). The Ninth
22 Circuit has articulated other considerations that are subsumed in
23 these basic factors, including: the plaintiff's choice of forum;
24 ease of access to the evidence; the familiarity of each forum with
25 the applicable law; the nexus between the forum and the causes of
26 action; the feasibility of consolidating other claims; any local
27 interest in the controversy; the relative court congestion and time
28 to trial in each forum; the location where the relevant agreements

1 were negotiated and executed; the parties' contacts with the
2 forums; any difference in the costs of litigation between the two
3 forums; and the availability of compulsory process to compel
4 attendance of unwilling non-party witnesses. Decker Coal Co. v.
5 Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986); Jones
6 v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). No
7 single factor is dispositive, and a district court has broad
8 discretion to adjudicate motions for transfer on a case-by-case
9 basis. Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988);
10 Sparling v. Hoffman Constr. Co., Inc., 964 F.2d 635, 639 (9th Cir.
11 1988).

12 DISCUSSION

13 I. Cascade's Application to These Cases

14 A monopolization claim under § 2 of the Sherman Act requires a
15 plaintiff to prove "(1) possession of monopoly power in the
16 relevant market, (2) willful acquisition or maintenance of that
17 power, and (3) causal 'antitrust injury.'" Rutman Wine Co. v. E. &
18 J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987). To demonstrate
19 a claim of attempted monopolization under § 2, the plaintiff must
20 show "(1) that the defendant has engaged in predatory or
21 anticompetitive conduct with (2) a specific intent to monopolize
22 and (3) a dangerous probability of achieving monopoly power."
23 Cascade, 515 F.3d at 893. As the Ninth Circuit has noted, the
24 requirements of both claims are similar, "differing primarily in
25 the requisite intent and the necessary level of monopoly power."
26 Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195,
27 1202 (9th Cir. 1997).

28 In the related case, In re Abbott Labs. Norvir Antitrust

1 Litigation, No. C 04-1511, the Court permitted the plaintiffs to
2 proceed on a theory of monopoly leveraging, as articulated in
3 Kodak. Under this theory, "a monopolist who acquires a dominant
4 position in one market through patents and copyrights may violate §
5 2 if the monopolist exploits that dominant position to enhance a
6 monopoly in another market." Id. at 1216.¹ Here, Plaintiffs
7 allege that Abbott has exploited its monopoly over the "booster
8 market," which is comprised only of Norvir, to seek a monopoly over
9 the "boosted market," which is comprised of drugs intended for use
10 with Norvir as a booster.

11 As noted above, Abbott has filed an omnibus motion to dismiss
12 based on the Ninth Circuit's recent decision in Cascade. Cascade
13 addresses the issue of when bundled discounts can be considered
14 anticompetitive conduct in violation of the Sherman Act.² As the
15 court explained:

17 ¹Abbott argues that Federal Circuit law bars Plaintiffs'
18 reliance on a monopoly leveraging theory, citing In re Independent
19 Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed.
20 Cir. 2000), in support of its position. According to Abbott, the
21 scope of its rights depends on the resolution of a substantial
22 question of federal patent law, and therefore the Federal Circuit
23 has jurisdiction over any appeal. The Court considered and
24 rejected this argument in In re Abbott Labs. Norvir Antitrust
25 Litigation, and it adheres to that decision. Kodak clearly touched
upon the limits of a patentee's rights, and yet the Ninth Circuit
crafted a rule as a matter of federal antitrust law, based on
Supreme Court precedent. To the extent Federal Circuit law
interprets that same precedent in a way that would warrant
dismissal of Plaintiffs' claims (and it is not clear that
Independent Service Organizations would in fact require dismissal),
the Court will follow the Ninth Circuit because those claims arise
under the Sherman Act, not federal patent law.

26 ² Exclusionary bundled pricing is not necessarily mutually
27 exclusive with a monopoly leveraging theory; bundled pricing can
28 serve as the means by which a plaintiff exploits its monopoly in
one market to enhance its monopoly in another market. Thus, both
Kodak and Cascade hypothetically could apply at the same time.

1 Bundling is the practice of offering, for a single price,
2 two or more goods or services that could be sold
3 separately. A bundled discount occurs when a firm sells
4 a bundle of goods or services for a lower price than the
5 seller charges for the goods or services purchased
6 individually. . . . Bundled discounts are pervasive, and
7 examples abound. Season tickets, fast food value meals,
8 all-in-one home theater systems -- all are bundled
9 discounts. . . . The varied and pervasive nature of
10 bundled discounts illustrates that such discounts
11 transcend market boundaries. On the one hand, the
12 world's largest corporations offer bundled discounts as
13 their product lines expand with the convergence of
14 industries. On the other hand, a street-corner vendor
15 with a food cart -- a merchant with limited capital --
16 might offer a discount to a customer who buys a drink and
17 potato chips to complement a hot dog. The fact that such
18 diverse sellers offer bundled discounts shows that such
19 discounts are a fundamental option for both buyers and
20 sellers.

21 Cascade, 515 F.3d at 894-95.

22 "Bundled discounts generally benefit buyers because the
23 discounts allow the buyer to get more for less." Id. at 895.
24 However, under some circumstances, bundled discounts can be
25 anticompetitive and run afoul of the antitrust laws. This may
26 happen where a firm "enjoys a monopoly on one or more of a group of
27 complementary products, but [] faces competition on others." Ortho
28 Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 467
(S.D.N.Y. 1996). The competitor who sells only one product in the
bundle, even while producing that product at a lower cost than the
monopolist, still "might not be able to match profitably the price
created by the multi-product bundled discount. This is true even
if the post-discount prices for both the entire bundle and each
product in the bundle are above the seller's cost." Cascade, 515
F.3d at 896 (citation omitted).

29 The Ortho court gave an example, which the Cascade decision
30 quotes in its entirety, of how this might happen:

1 Assume for the sake of simplicity that the case involved
2 the sale of two hair products, shampoo and conditioner,
3 the latter made only by A and the former by both A and B.
4 Assume as well that both must be used to wash one's hair.
5 Assume further that A's average variable cost for
6 conditioner is \$2.50, that its average variable cost for
7 shampoo is \$1.50, and that B's average variable cost for
8 shampoo is \$1.25. B therefore is the more efficient
9 producer of shampoo. Finally, assume that A prices
10 conditioner and shampoo at \$5 and \$3, respectively, if
11 bought separately but at \$3 and \$2.25 if bought as part
12 of a package. Absent the package pricing, A's price for
13 both products is \$8. B therefore must price its shampoo
14 at or below \$3 in order to compete effectively with A,
15 given that the customer will be paying A \$5 for
conditioner irrespective of which shampoo supplier it
chooses. With the package pricing, the customer can
purchase both products from A for \$5.25, a price above
the sum of A's average variable cost for both products.
In order for B to compete, however, it must persuade the
customer to buy B's shampoo while purchasing its
conditioner from A for \$5. In order to do that, B cannot
charge more than \$0.25 for shampoo, as the customer
otherwise will find A's package cheaper than buying
conditioner from A and shampoo from B. On these
assumptions, A would force B out of the shampoo market,
notwithstanding that B is the more efficient producer of
shampoo, without pricing either of A's products below
average variable cost.

16 Id. at 896-97 (quoting Ortho, 920 F. Supp. at 467).

17 Thus, "a bundled discounter can exclude rivals who do not sell
18 as great a number of product lines without pricing its products
19 below its cost to produce them," thereby "achiev[ing] exclusion
20 without sacrificing any short-run profits." Id. at 897. For this
21 reason, the test set forth by the Supreme Court to identify illegal
22 predatory pricing in the sale of a single product is not directly
23 applicable to bundled discount cases; that test requires the
24 plaintiff to show that the defendant's low prices are below its
25 incremental costs -- in other words, that the defendant is selling
26 the product at a loss in order to drive out competition. See
27 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S.
28 209, 222 (1993).

1 Faced with this difficulty, the Cascade court developed a test
2 to determine when bundled pricing is anticompetitive. After
3 considering various alternatives, the court settled on a "discount
4 attribution" standard:

5 Under this standard, the full amount of the discounts given by
6 the defendant on the bundle are allocated to the competitive
7 product or products. If the resulting price of the
8 competitive product or products is below the defendant's
9 incremental cost to produce them, the trier of fact may find
10 that the bundled discount is exclusionary for the purpose of
11 § 2. This standard makes the defendant's bundled discounts
12 legal unless the discounts have the potential to exclude a
13 hypothetical equally efficient producer of the competitive
14 product.

15 Cascade, 515 F.3d at 906. The court believed this standard was in
16 line with the Supreme Court's direction in Brooke and other cases
17 that low prices, which generally benefit the consumer, should not
18 be condemned unless they are below some measure of the defendant's
19 cost.

20 The Cascade court explained how its rule would apply to the
21 shampoo example: The entire discount on the package of products,
22 \$2.75, is subtracted from the \$3 price of the competitive product,
23 shampoo, when bought separately. The resulting effective price of
24 the shampoo is thus \$0.25, well below A's incremental cost of
25 producing it, \$1.50. Accordingly, "A's pricing practices exclude
26 potential competitors that could produce shampoo more efficiently
27 than A (i.e., at an incremental cost of less than \$1.50)" but who
28 are unable to produce shampoo at an incremental cost of \$0.25. Id.
29 at 906 n.15. A's bundled discount therefore could be considered
30 exclusionary.

31 After deciding on the discount attribution rule, the court
32 then turned to the appropriate measure of "incremental costs" in a
33

1 bundled discount case. It noted that there are several possible
2 methods of measuring costs:

3 [F]irms face both fixed costs -- costs that a firm must
4 bear regardless of the amount of output -- and variable
5 costs -- costs that change with the amount of output.
6 The sum of fixed and variable costs is a firm's total
7 cost. Marginal cost is the increase to total cost that
8 occurs as a result of producing one additional unit of
9 output. Average cost is the sum of fixed costs and total
10 variable costs, divided by the amount of output.

11 Id. at 909.

12 The court expressed its approval of the view of Professors
13 Areeda and Turner, set out in their classic law review article,
14 that marginal cost -- defined as "the cost to produce one
15 additional unit and the price that would obtain in the market under
16 conditions of perfect competition" -- is the "optimal measure of a
17 firm's costs in a predatory pricing case." Id.; see also Phillip
18 Areeda & Donald F. Turner, Predatory Pricing and Related Practices
19 Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 712, 716
20 (1975). Practically speaking, however, it is often not possible to
21 determine the marginal cost from a firm's accounting practices.
22 Accordingly, the average variable cost, which is more easily
23 determined, must serve as a surrogate for the marginal cost. The
24 Cascade court held, therefore, that average variable cost is the
25 appropriate measure of incremental costs for the bundled pricing
26 standard. Id.

27 The central question raised by Abbott's omnibus motion is
28 whether Cascade's rule applies in the context of these cases, such
that Plaintiffs must show that the imputed price of lopinavir (the
competitive product) in Kaletra is below Abbott's average variable
cost of producing it.

1 As an initial matter, it is far from clear that Abbott's sale
2 of Kaletra represents a bundled discount. Consumers do not
3 purchase Kaletra because it provides them with a way to save on two
4 products they would otherwise have to purchase separately. In
5 fact, it is not readily apparent that Kaletra consists of two
6 products at all -- ritonavir and lopinavir are combined in a single
7 pill. Abbott does not offer lopinavir for sale independently of
8 ritonavir; lopinavir is not licensed by the FDA for use except as
9 part of Kaletra. Thus, it is not possible for Abbott to offer an
10 actual discount on lopinavir when sold as part of Kaletra.

11 Abbott's marketing of Kaletra reveals that Abbott itself does
12 not treat the drug as a package of multiple products -- it is
13 offered in an "all or nothing" form. In fact, Abbott's expert in
14 In re Abbott Labs. Norvir Antitrust Litigation explicitly argues in
15 his rebuttal report that a bundled discount theory does not apply
16 to Abbott's pricing structure -- the relevant heading is entitled,
17 "Abbott does not offer bundled discounts, nor is the challenged
18 pricing structure economically equivalent to bundled discounts."
19 Pls.' Req. For Judicial Notice Ex. 1 at 18.³ Abbott's expert
20 states:

21 In the case of Abbott, a bundled discount would require
22 that Abbott provide a significant discount on Norvir
23 contingent on the patient also purchasing lopinavir.
24 However, Abbott does not offer such discounts on Norvir
25 for patients that purchase lopinavir. Nor does it sell
26 lopinavir as a stand-alone PI. Rather, Abbott's pricing
27 structure, according to Prof. Greer, is a high price of
28 Norvir and a "too low" price of Kaletra.

Id.

28 ³The Court grants Plaintiffs' request for judicial notice of
this portion of the expert rebuttal report.

1 Even if Kaletra represents a bundled discount such that these
2 cases fall within the general purview of Cascade, it does not
3 follow that the Court must mechanically apply the Cascade rule
4 regardless of its effect under the circumstances. Cascade itself
5 implicitly acknowledges that some atypical cases may fall outside
6 of the situation where only below-cost pricing will have the effect
7 of inhibiting competition. In discussing the application of Brooke
8 to bundled pricing cases, the Cascade court noted that the Supreme
9 Court has never gone "so far as to hold that in every case in which
10 a plaintiff challenges low prices as exclusionary conduct the
11 plaintiff must prove that those prices were below cost." Cascade,
12 515 F.3d at 901. Instead, the Ninth Circuit viewed the Supreme
13 Court's opinions as "strongly suggest[ing] that, in the normal
14 case, above-cost pricing will not be considered exclusionary
15 conduct for antitrust purposes." Id. (emphasis added).

16 Abbott's sale of Kaletra -- if it represents a bundled
17 discount -- is a strong candidate for the exception contemplated by
18 the Ninth Circuit. This is because the stated goal of the Cascade
19 rule -- making unlawful only pricing that would exclude equally
20 efficient competitors from the market -- would not be served by
21 applying the rule here.

22 To illustrate why this is the case, it is instructive to apply
23 the rule to the facts. Abbott charges \$17.14 for 200 milligrams of
24 Norvir, while charging \$18.78 for a dose of Kaletra containing the
25 same amount of ritonavir. Norris Dec. (Docket No. 20, Case No.
26 07-5985) Ex. A at 8.⁴ The imputed price of the lopinavir portion

27
28 ⁴These figures are found in a Health and Human Services letter
(continued...)

1 of Kaletra is the difference between the two amounts, or \$1.64.⁵
2 Therefore, under a straightforward application of the Cascade rule,
3 Abbott's pricing could be found anticompetitive only if its average
4 variable cost of producing lopinavir is greater than \$1.64.

5 As the parties note, the cost of manufacturing Kaletra pills
6 is negligible -- most likely only a few cents per pill.⁶ Assuming
7 for the sake of argument that Abbott's average variable cost of
8 producing lopinavir is \$0.05, if the Cascade rule applied, Abbott's
9 sale of the drug for \$1.64 cannot be an antitrust violation. In
10 fact, at a hypothetical production cost of \$0.05, the Cascade rule
11 would permit Abbott to sell Norvir at a price of up to \$18.73.

12 But at such a price, competitors would have to sell an equally
13 effective product for \$0.05 or less in order to compete with
14 Kaletra. Common sense dictates that no newly developed PI could
15 ever be sold profitably at such a price, because the manufacturer

16 ⁴(...continued)
17 referred to in the complaint. The Court uses them for illustrative
18 purposes, not as evidence in support of its decision.

19 ⁵Because Abbott does not sell lopinavir separately, the price
20 of unbundled lopinavir cannot be used as a starting point for the
21 calculation, as the Cascade rule contemplates will ordinarily be
22 done. Nonetheless, only two variables are required in order to
23 derive the "discounted price" of lopinavir. To demonstrate this,
24 assume that Abbott sells lopinavir separately for price "x." The
cumulative discount represented by Kaletra would then be $x + \$17.14 - \18.78 , or $x - \$1.64$, all of which must be allocated to the
lopinavir portion pursuant to the rule. Subtracting the discount
of $x - \$1.64$ from the price of lopinavir, x , results in an imputed
discounted price of \$1.64.

25 ⁶The Meijer Plaintiffs argue that Abbott's average variable
26 costs should include more than just the cost of manufacturing; they
argue that marketing and promotion costs should also be included.
27 This is a valid argument, and would raise the average variable cost
above the pennies-per-pill cost of manufacturing. However, because
28 the Court finds that the Cascade rule does not apply, it need not
determine whether marketing and similar costs should be considered
when calculating Abbott's average variable cost.

1 would never be able to recoup its huge research and development
2 costs. If the Cascade rule were applied in this context, it would
3 stifle competition; even a competitor who could produce an equally
4 effective drug for only \$0.01 per pill would be excluded from the
5 market. Thus, as applied here, the Cascade rule does not achieve
6 its stated goal of prohibiting pricing that results in the
7 exclusion of equally efficient competitors. This failure is
8 attributable to the unique structural characteristics of the
9 pharmaceutical industry, where fixed costs in the form of
10 investment in research and development dwarf variable costs.⁷

11

12 ⁷It is notable that Cascade and the law review article on
13 which it relies are based on the premise that, in a perfectly
14 competitive market, the market price will equal the marginal cost.
15 See Cascade, 515 F.3d at 909; Areeda & Turner, supra, at 702.
16 However, in the pharmaceutical industry, even in a crowded field of
17 competing drugs, market prices will typically be well above
18 marginal costs. See, e.g., Peter K. Yu, the International
19 Enclosure Movement, 82 Ind. L.J. 827, 898 n.377 (2007) ("The model
20 of price-setting in a perfectly competitive market suggests that
21 prices are based upon marginal costs. But this model obviously
22 does not apply for pharmaceuticals, for if they were priced
23 according to their marginal costs, they would be very inexpensive,
24 but in the long run no expenditures on R&D would be made.");
Brianna Carignan, Legalizing Importation of Prescription Drugs: The
Economic Implications of the Pharmaceutical Market Access and Drug
Safety Act of 2005, 12 New Eng. J. Int'l & Comp. L. 161, 165 (2005)
(" [T]he developer of a drug could never recover its research and
development costs by charging prices near its marginal cost of
production. The economic purpose of patents is to bar entry of
copy products for the term of the patent, to provide the innovator
firm with an opportunity to price above marginal cost and thereby
recoup R&D expense, in order to preserve incentives for future R&D.
Without patents, generic pharmaceuticals could enter the market
immediately and price at marginal cost because they would not have
any R&D expenses to recover.") (citation, internal quotation marks
and alterations omitted).

25 Abbott notes that Cascade involves bundled discounting in the
26 provision of healthcare services. Abbott asserts that the
27 healthcare services industry is one with high fixed costs, and thus
28 pharmaceutical cases cannot be distinguished from Cascade.
However, while the provision of healthcare services may involve
high fixed costs, variable costs -- including the cost of
compensating medical professionals for their time -- are high as
(continued...)

More fundamentally, using average variable cost as a gauge of anticompetitive pricing leads to an exclusive concern with promoting manufacturing efficiency. But such a concern is not relevant here, where the goal is to prevent pricing that would exclude new, equally effective PIs from competing with lopinavir, provided those PIs can be developed and introduced at least as efficiently as lopinavir. The present cases are not concerned with the potential exclusion of equally efficient manufacturers of lopinavir. Yet the Cascade rule is equipped only to address this latter scenario.⁸

11 An antitrust doctrine that seeks exclusively to promote the
12 efficient production of pills will not serve to promote the
13 introduction of new medicines to compete with a patented drug. An
14 appropriate antitrust rule here should have the effect of
15 prohibiting Abbott's pricing practices if a hypothetical equally
16 efficient developer of an equally effective PI would not be able to
17 profit if it introduced that PI to the market at a price of \$1.64,
18 the imputed price of lopinavir. As demonstrated, the average-
19 variable-cost rule does not accomplish that goal.⁹ Accordingly,

⁸In contrast, manufacturing efficiency is an appropriate focus when the issue is competition between different manufacturers of a single drug for which the patent has expired. Accordingly, the Cascade rule would achieve the desired effect when applied in such a case.

26 ⁹It may be possible to adjust the rule to shift the focus away
27 from the marginal cost of manufacturing pills. For instance, it
28 may be appropriate to require Plaintiffs to show, not that \$1.64 is
less than Abbott's cost of producing 200 milligrams of lopinavir.

(continued...)

1 the Court concludes that the present cases fall within the
2 exception contemplated by Cascade, and thus Plaintiffs need not
3 allege or show that the imputed price of the lopinavir portion of
4 Kaletra is less than Abbott's average variable cost of producing
5 it.

6 II. Monopolization of the Boosting Market

7 The Meijer, Rochester and Louisiana Plaintiffs assert a
8 Sherman Act claim that the other Plaintiffs do not: they allege
9 that Abbott illegally monopolized the boosting market by keeping
10 the price of Norvir low, thereby providing little incentive for
11 competitors to develop products to compete with it or technologies
12 to reduce the amount of Norvir that must be used as a boosting
13 agent, then raising prices. The other Plaintiffs assert only that
14 Abbott monopolized the boosted market.¹⁰

15 Abbott claims that its patents entitle it to a monopoly in the
16 boosting market. However, the extent of Abbott's exclusionary

17
18 ⁹(...continued)
19 but that \$1.64 is not a profitable price for the sale of a 200-mg
20 dose of lopinavir, taking into account the costs Abbott incurred
21 prior to introducing lopinavir to the market.

22 Such a "modified" Cascade rule may be difficult to implement
23 in practice. For instance, if Abbott has already recouped its
24 investment in lopinavir, \$1.64 may be a profitable price for it
25 today, even if Abbott could not have hoped to recoup its investment
26 by selling lopinavir for \$1.64 when it was first introduced to the
27 market. At the same time, asking if \$1.64 would have been a
28 profitable price for lopinavir when Abbott first introduced it to
the market would require the development of complex economic models
that depend on variables which may not be readily ascertainable.

¹⁰In their briefs on the present motions, these Plaintiffs
articulate two theories of antitrust liability that the plaintiffs
in In re Abbott Labs Norvir Antitrust Litigation have not asserted.
Because the complaints in the present cases do not assert separate
claims based on these "new" theories, however, the Court need not
rule on their validity. The Court thus addresses only whether
Plaintiffs may proceed on their claims for monopolization and
attempted monopolization under the Sherman Act.

1 rights under its patents is not clear from the face of the
2 complaint. Thus, dismissal of this claim is premature, and
3 Abbott's motion is denied.

4 III. Abbott's Motion to Dismiss GSK's Claims

5 A. Sherman Act Claims

6 In its order denying Abbott's motion for summary judgment in
7 In re Abbott Labs. Norvir Antitrust Litigation, the Court found
8 that there was a triable issue of fact regarding whether Abbott's
9 patent rights extend beyond the booster market to the boosted
10 market, thereby entitling it to maintain a monopoly over the latter
11 market. Abbott maintains that, in the SmithKline Beecham
12 complaint, GSK admits that Abbott's patents cover the boosted
13 market, essentially "pleading itself out of court."

14 In support of its argument, Abbott cites the following
15 paragraphs of the complaint:

16 17. Abbott never sought to use its intellectual property
17 to prevent others from selling PIs for
18 administration with Norvir. Instead, it chose to
18 profit by licensing competitors the right to market
18 PIs to be co-administered with Norvir.

19 20. In 2001, Abbott approached GSK to demand that it
20 secure a license to allow GSK to promote its
21 existing PIs, as well as PIs it had under
21 development, with Norvir. GSK acquiesced to this
22 demand, procuring a license from Abbott in December
22 2002.

23 21. Under the agreement, Abbott gave GSK the right to
23 promote the use and administration of its PIs with
24 Norvir. Abbott knew that GSK's plan was to use the
24 Norvir license in order to promote GSK's PIs in
25 boosted form. GSK paid substantial sums of money in
25 consideration for this license.

26 22. GSK is informed and believes, and therefore alleges,
27 that other pharmaceutical companies, including BMS,
27 took similar licenses allowing the promotion of
28 their PIs with Norvir during the same timeframe.

1 36. Abbott's decision to raise the price of Norvir by
2 400 percent was unprecedented and taken in bad
3 faith. The 400 percent price hike immediately after
4 GSK's release of Lexiva dashed GSK's reasonable
5 expectation that, by virtue of the license for which
6 it had paid, it would be able to promote the
7 co-prescription and co-administration of its PIs
8 products with Norvir at prices competitive with
9 those of Kaletra and other PIs. . . .

10 Compl., Case No. C 07-5702.

11 Contrary to Abbott's characterization of these statements,
12 they do not admit or necessarily imply that Abbott has a valid
13 patent covering the entire boosted market.¹¹

14 Nor is GSK precluded from asserting its claims by virtue of
15 its license agreement with Abbott, which gives GSK the right to
16 market its own PIs for use with Norvir as a booster. As this Court
17 has noted previously, a party may choose to obtain a license, even
18 under the belief that the licensed patent is invalid or does not
19 cover the scope claimed by the patentee, in order to avoid the
20 possibility of litigation. Cf. MedImmune v. Genentech, Inc.,
21 __ U.S. __, 127 S. Ct. 764 (allowing a current licensee to bring an
22 action for a declaratory judgment of noninfringement and
23 invalidity).

24 Abbott also notes that the license contains a recital stating,
25 "Abbott owns certain patents related to the use, marketing and
26 promotion of Ritonavir (as defined below), its protease inhibiting
27 compound (marketed under the trade name Norvir), in combination
28 with other products indicated for the treatment of HIV." Norris
Dec. Ex. A at 1. This recital, however, does not specify that

29 ¹¹In addition, Abbott's argument presupposes that it will raise
30 its patents as an affirmative defense. Because this defense does
31 not appear clearly on the face of the pleading, dismissal at this
32 stage is not appropriate in any event.

1 Abbott possesses valid patents giving it the rights it now claims
2 over the boosted market. Even if it did, such a statement would
3 not constitute a binding admission in this litigation, in that it
4 is not a promise comprising a part of the bargained-for exchange
5 that is the subject of the license agreement.

6 B. State Law Claims

7 1. Breach of the Implied Covenant of Good Faith and
8 Fair Dealing

9 GSK asserts a claim for breach of the implied covenant of good
10 faith and fair dealing under New York law, which applies pursuant
11 to the choice-of-law provision in the license agreement. In
12 connection with this claim, GSK asserts that it was deprived of the
13 benefit of the license agreement's bargain when Abbott raised the
14 price of Norvir. GSK maintains that, when it agreed to pay
15 substantial royalties for the right to market its PIs for use in
16 conjunction with Norvir, it had a "reasonable expectation that
17 Norvir would continue to be commercially available for use as a PI
18 boosting agent and that future increases in the price of Norvir
19 would be consistent with past increases." SmithKline Beecham
20 Compl. ¶ 64. When Abbott raised the price of Norvir, GSK claims it
21 acted in bad faith by intentionally "thwart[ing] GSK's ability to
22 benefit from [its] contracted rights." Id.

23 Under New York law, "[i]mplicit in all contracts is a covenant
24 of good faith and fair dealing in the course of contract
25 performance." Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291
26 (N.Y. 1995). Abbott has cited lower court cases from New York
27 holding that a claim for breach of the implied covenant of good
28 faith and fair dealing cannot take the place of a substantively

1 nonviable breach of contract claim, see e.g., Nikitovich v. O'Neal,
2 836 N.Y.S.2d 34 (App. Div. 2007), and that a claim for the breach
3 of the implied covenant of good faith and fair dealing may not be
4 asserted independently of a breach of contract claim when it is
5 based on the same facts, see, e.g., Cohen v. Nassau Educators Fed.
6 Credit Union, 2006 WL 1540324, at *4 (N.Y. Sup. Ct. 2006). Neither
7 of these is the situation here.

8 In addition, the New York Court of Appeals has held that a
9 breach of the implied covenant of good faith and fair dealing can
10 itself serve as the basis for a breach of contract claim. In 511
11 West 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496
12 (N.Y. 2002), the court permitted the plaintiffs to proceed on a
13 breach of contract claim based on their allegation that the
14 offering plan for the conversion of an apartment building into a
15 cooperative included an implied promise by the sponsor to sell all
16 unsold units within a reasonable time. Such a promise was not
17 explicitly contained in the contract. The court held that,
18 "[w]hile the duties of good faith and fair dealing do not imply
19 obligations inconsistent with other terms of the contractual
20 relationship," they do require that "neither party shall do
21 anything which will have the effect of destroying or injuring the
22 right of the other party to receive the fruits of the contract."
23 Id. at 500 (internal quotation marks omitted). Accordingly, a
24 party may pursue a breach of contract claim for violation of "any
25 promises which a reasonable person in the position of the promisee
26 would be justified in understanding were included." Id. at 501
27 (internal quotation marks omitted).

28 Here, GSK's second cause of action is entitled, "Breach of

1 Covenant of Good Faith and Fair Dealing," not breach of contract.
2 To the extent Abbott argues that this claim should be dismissed
3 because it must be stated as a breach of contract claim, its
4 argument fails. "The form of the complaint and the label attached
5 by the pleader are not controlling, and it is enough that the
6 pleader state the facts making out a cause of action." Drezin v.
7 DeLisser, __ N.Y.S.2d __, 2007 WL 2894083, at *4 (Sup. Ct. 2007)
8 (citing Van Gaasbeck v. Webatuck Cent. School Dist. No. 1, 234
9 N.E.2d 243 (N.Y. 1967)). GSK alleges that Abbott undertook an
10 implied obligation to continue to make Norvir commercially
11 available and to keep future increases in the price of Norvir in
12 line with past increases. Whether Abbott in fact undertook such an
13 obligation is an issue of fact that is not appropriately determined
14 on a motion to dismiss. Because such an implied obligation would
15 not necessarily be inconsistent with the express terms of the
16 license agreement, the Court finds that GSK has sufficiently plead
17 a claim for breach of an implied term of the license agreement.

18 2. North Carolina Unfair Trade Practices Act and
19 Prohibition Against Monopolization

20 Abbott argues that GSK has failed to state a claim under the
21 North Carolina Unfair Trade Practices Act, N.C. Gen. Stat.
22 § 75-1.1. To state such a claim, a plaintiff must allege: "(1) an
23 unfair or deceptive act or practice, or unfair method of
24 competition, (2) in or affecting commerce, and (3) which
25 proximately caused actual injury to the plaintiff or his business."
26 Miller v. Nationwide Mut. Ins. Co., 435 S.E.2d 537, 542 (N.C. Ct.
27 App. 1993). The Act is a "comprehensive law designed to include
28 within its reach the federal antitrust laws." L.C. Williams Oil

1 Co., Inc. v. Exxon Corp., 625 F. Supp. 477, 481 (M.D.N.C. 1985).
2 Accordingly, Sherman Act violations are likely to be actionable
3 under the Unfair Trade Practices Act. Additionally, the North
4 Carolina Act "also sanctions, as part of its broad remedial purpose
5 of promoting ethical business dealings, commercial 'unfairness' and
6 'deception' beyond traditional antitrust concepts." Id. (citing
7 Marshall v. Miller, 276 S.E.2d 397, 403 (N.C. 1981)).

8 North Carolina courts apparently have not addressed whether a
9 cause of action based on a monopoly leveraging theory may lie under
10 the Unfair Trade Practices Act. Accordingly, the Court must
11 predict how the North Carolina Supreme Court would resolve this
12 issue. See Westlands Water Dist. v. Amoco Chem. Co., 953 F.2d
13 1109, 1111 (9th Cir. 1991).

14 Abbott argues that the North Carolina Supreme Court would
15 follow the Seventh Circuit and the Federal Circuit in rejecting
16 liability under a monopoly leveraging theory. However, Abbott has
17 cited no North Carolina case or any other evidence in support of
18 this contention,¹² and thus has provided no basis for the Court to
19 apply a different antitrust standard than that which it has applied
20 to GSK's Sherman Act claim.¹³ In addition, even if the North
21

22 ¹²The only case Abbott cites is a federal case in which the
23 court predicted that the Fourth Circuit would not find a violation
24 of § 2 of the Sherman Act based on a monopoly leveraging theory.
Bepco, Inc. v. Allied-Signal, Inc., 106 F. Supp. 2d 814, 833
(M.D.N.C. 2000). This sheds no light on the question of whether
25 the North Carolina Supreme Court would accept such a theory under
the Unfair Trade Practices Act. Moreover, the Bepco court
26 permitted the plaintiffs to proceed on their claims under the
Unfair Trade Practices Act.

27 ¹³For the same reason, GSK has also stated a claim under the
28 North Carolina Prohibition Against Monopolization, N.C. Gen. Stat.
§ 75-2.1.

1 Carolina Supreme Court would not recognize monopoly leveraging as a
2 form of anticompetitive conduct, GSK has alleged conduct that could
3 be considered "unfair" or "deceptive" under the Act.¹⁴ Accordingly,
4 GSK may proceed on its claim.

5 IV. Abbott's Motion to Transfer the SmithKline Beecham Case

6 Abbott seeks to transfer the SmithKline Beecham case to
7 Illinois. It is true that the only apparent connection between the
8 case and California is that California is home to a large number of
9 HIV-positive individuals who may be consumers of boosted PIs.
10 However, this case has no greater connection to Illinois, except
11 that Illinois is the site of Abbott's headquarters. Illinois thus
12 has no particular interest in this case other than the generalized
13 interest in ensuring that its citizens receive fair adjudications.

14 While Abbott claims that transferring the case to Illinois
15 would be more convenient for it, this claim is undercut by the fact
16 that Abbott would continue to have to defend itself in the related
17 cases still before this Court, while defending itself in a new
18 forum as well. Moreover, GSK apparently finds California to be a
19 convenient forum, and it would not be appropriate to transfer this
20 case on convenience grounds when the effect would be simply to make
21 the litigation more convenient for one party at the expense of the

22

23 ¹⁴Abbott argues that, in order for a claim for deceptive
24 behavior to lie, there must be detrimental reliance upon a
25 statement or misrepresentation, citing Business Cabling, Inc. v.
26 Yokeley, 643 S.E.2d 63, 36 (N.C. Ct. App. 2007), in support of its
27 position. Yokeley, however, was concerned with determining whether
the plaintiff had established causation between the deceptive acts
and a compensable injury. No such issue is present here. In
addition, another North Carolina appeals court has held that actual
reliance on a misrepresentation is not required. See Cullen v.
Valley Forge Life Ins. Co., 589 S.E.2d 423, 431 (N.C. Ct. App.
2003).

1 other party. See STX, Inc. v. Trik Stik, Inc., 708 F. Supp. 1551,
2 1556 (N.D. Cal. 1988); Decker Coal, 805 F.2d at 843.

3 Additionally, it would not be in the interest of justice to
4 transfer this case because it would needlessly splinter the
5 litigation. Nor has Abbott shown that the availability of
6 witnesses or evidence will be an issue if the case continues in
7 this District, particularly considering that the related cases will
8 continue before the Court whether SmithKline Beecham is transferred
9 or not. As for Abbott's charge that GSK has engaged in forum
10 shopping, it appears equally likely that Abbott is engaging in
11 similar conduct; by litigating the case in Illinois, Abbott would
12 be able to rely on Seventh Circuit precedent, which is more
13 favorable to Abbott than Ninth Circuit precedent.

14 Accordingly, the Court declines to exercise its discretion to
15 transfer this case to Illinois.

16 CONCLUSION

17 For the foregoing reasons, Abbott's motions to dismiss are
18 DENIED. Abbott's motion to transfer the SmithKline Beecham case is
19 also DENIED.

20 IT IS SO ORDERED.

21
22 Dated: 4/11/08
23



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26
27
28 CLAUDIA WILKEN
United States District Judge